ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-98
INTERCONNECTION BETWEEN LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS	CC Docket No. 95-158

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION TO REQUESTS FOR A STAY PENDING JUDICIAL REVIEW OF THE FLORIDA PUBLIC SERVICE COMMISSION AND THE IOWA UTILITIES BOARD

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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September 25, 1996

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SUMMARY

The Telecommunications Resellers Association, an organization consisting of nearly 500 resale carriers and their underlying product and service suppliers, urges the Commission to deny the Motions for Stay Pending Judicial Review filed by the Florida Public Service Commission and the Iowa Utilities Board, respectively, in the captioned docket and to permit the rules adopted in the First Report and Order implementing the local telecommunications competition provisions of the Telecommunications Act of 1996 to become effective as currently scheduled.

The Commission has already addressed and rejected the objections raised by the Florida Public Service Commission and the Iowa Utilities Board to the First Report and Order, denying each on sound legal and policy grounds. The Commission acted securely within its 1996 Act statutory authority in adopting its local competition rules; no jurisdictional issue is presented here. Additionally, like that asserted by GTE, SNET and U S West, the generalized injury to Florida businesses and residents claimed by the Florida Public Service Commission is far too speculative to warrant grant of the requested stay; likewise the irreparable harm alleged by the Iowa Utilities Board -- that imposition of the Commission's default proxies would undermine efforts toward competition already undertaken in Iowa, is firmly within the ability of the IUB to avoid through conduct of a state cost study.

Conversely, grant of the stay would harm new entrants into the local telecommunications market, particularly smaller providers such as those that comprise the rank and file of TRA. And the public interest certainly would not be served by delaying the availability of competitive local telecommunications services offerings. In short, neither the

Florida Public Service Commission nor the Iowa Utilities Board has made the threshold showing necessary to warrant serious consideration, much less grant, of the extraordinary relief requested.

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OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the Motions For Stay Pending Judicial Review ("Motions") filed by the Florida Public Service Commission ("FPSC") and the Iowa Utilities Board ("IUB") (collectively, the "States") in the captioned docket. In the Motions, the States urge the Commission to stay in its entirety the effectiveness of the First Report and Order, FCC 96-325 (released August 8, 1996), and the rules adopted therein. However, in support of the extraordinary relief they seek, the States merely reargue matters already addressed and disposed of by the Commission in the First Report and Order and in denying stay requests previously filed by GTE Corporation ("GTE"), the Southern New England Telephone Company ("SNET") and U S West, Inc. ("U S West"),

determining these issues insufficient to support grant of a stay.[1] Accordingly, TRA urges the Commission to deny the instant Motions for Stay.

I.

INTRODUCTION

TRA, an association of nearly 500 resale carriers and their underlying product and service vendors, was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services.[2] TRA's resale carrier members are also poised to enter the local telecommunications market and to bring to small

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-378 (released September 17, 1996) ("Stay Order").

[2] TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of the resale industry over the past five to ten years have produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

business and residential users of local service the affordable rates, service diversity and personalized customer service that has allowed them to capture a five to ten percent share of the interexchange market in less than a decade.

It is well settled that a stay of a Commission action is an extraordinary form of relief which requires satisfaction of a stringent multi-pronged test.[3] In addressing requests for extraordinary relief, the Commission has long applied the four-factor test announced in Virginia Petroleum Jobbers Association v. FCC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).[4] Thus, an applicant for stay must show that (i) it is likely to succeed on the merits on appeal; (ii) it will suffer irreparable harm in the absence of a stay; (iii) a stay would not substantially harm other interested parties; and (iv) a stay would serve the public interest. While in some circumstances these criteria can be balanced such that a particularly strong showing under one test can compensate for a weak showing under another, a failure to make a threshold showing under any one of the criteria is generally fatal.[5] None of the petitioners thus far, including the States, has satisfied the multi-pronged test. Accordingly, the States' Motions for Stay, like the Stay Requests of SNET, GTE and U S West before them, should be summarily denied and the pro-competitive rules adopted by the Commission in the First Report and Order should be allowed to take effect without delay.

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[3] *See, e.g.,* Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, 11 FCC Rcd. 5215 (1995).

[4] *See, e.g.,* Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979, ¶ 17 (1995); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123, ¶ 6 (1992).

[5] *See, e.g.,* Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd. 5228, ¶ 14 (1990).

II.

ARGUMENT

A. The States Have Not Shown A Likelihood of Success On The Merits On Appeal

In attempting to document their likelihood of success on the merits on appeal, the States raise the oft-repeated argument that the Commission has overstepped the authority granted it by the Congress in the 1996 Act and impermissibly intruded into areas expressly reserved to the states. As the Commission has correctly noted, "[t]he Telecommunications Act of 1996 fundamentally changes telecommunications regulation" and "recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services."[6] As the Commission further recognized, "[t]he 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues."[7]

The Commission is correct in its view that in the 1996 Act, "Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act."[8] The 1996 Act clearly expands the scope of federal authority into historically intrastate matters. In some instances, such expansion is explicitly noted, as in Section 251(e)(1), 253 or 276(b)(1);[9] in other instances, it is clear from the nature of the Congressional directive. Section 251(d)(1)'s mandate that the Commission adopt regulations implementing Section 251

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[6] First Report and Order, FCC 96-325 (released August 8, 1996) at ¶¶ 1-2.

[7] Id. at ¶ 24.

[8] Id. at ¶ 83.

[9] 47 U.S.C. §§ 251(e)(1), 253, 276(b)(1).

is an illustration of the latter category, given that Section 251 addresses primarily local telecommunications matters.[10]

A component of the broad Section 251(d)(1) directive is that the Commission implement the Section 251(c)(2), (3) and (4) requirements that interconnection be provided and unbundled network elements be made available on rates, terms and conditions that are just, reasonable and nondiscriminatory," and that retail services be offered at "wholesale rates".[11] This the Commission has done -- as it was required to do -- by adopting national pricing rules which will be applied by the States in accordance with Section 252(d). Section 252(d), in turn, directs the States to actually set rates, applying in so doing the implementing rules adopted by the Commission.[12] Section 252(c) confirms that among the standards to be applied in State-conducted arbitrations are regulations prescribed by the Commission pursuant to Section 251(d).[13]

As the Commission has noted, Congress created a new regulatory regime in the 1996 Act, imposing federal authority over matters heretofore reserved solely for State regulation. Section 2(b) of the Communications Act does not diminish the authority granted to the Commission pursuant to Sections 251(e)(1), 253 or 276(b)(1), nor can Section 2(b) limit the Commission's mandate under Section 251(d)(1). Well established rules of statutory construction confirm this view. First, it is well established that specific statutory provisions prevail over more

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[10] 47 U.S.C. § 251(d)(1).

[11] 47 U.S.C. §§ 251(c)(2), 251(c)(3), 251 (c)(4).

[12] 47 U.S.C. § 252(d).

[13] 47 U.S.C. §252(c).

general provisions.[14] in the event of a conflict between two statutory provisions, the provision that was last in time or last in order of arrangement will prevail.[15] In this case, Sections 251 and 252 are more specific and enacted later than Section 2(b) and hence prevail over Section 2(b)'s general reservation of power to the States. Finally, it is well settled that Section 2(b) cannot defeat express authority granted to the Commission elsewhere in the Communications Act.[16]

The Commission has also already addressed the remaining issues raised by the States. For example, FPSC complains that the Commission set a default ceiling for unbundled loop prices in Florida at a rate well below the level FPSC had established for GTE-Florida. The Commission specifically addressed this point in denying GTE's stay request, noting that

> [I]t is no surprise, and certainly not error, that the price ceiling for Florida -- or for Connecticut, Colorado, Michigan, Illinois, or Oregon, for that matter -- does not equal the results of the cost studies in those individual states. We concluded that an average of the six states' prices represented the best estimate of forward-looking loop costs available to us at that time, and that relying on an average of the nationwide relative costs from the *Hatfield* and *BCM* models was the best method of deriving proxy price ceilings in individual states. We believe our methodology is reasonable, even though our proxy ceiling in Florida is $13.68 while the Florida Commission set a $20 per loop price for GTE Florida.[17]

Likewise, with respect to IUB's objection, the Commission is on equally firm ground. The default pricing proxies were adopted as interim measures to expedite

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[14] *See, e.g.,* Mesa Petroleum Co. v. FERC, 688 F.2d 1014, 1016 (5th Cir. 1982); FTC v. Manager, Retail Credit Co., Miami Beach Branch Office, 515 F.2d 988 (D.C. Cir. 1975); American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973).

[15] *See, e.g.,* Intercontinental Promotions, Inc. v. MacDonald, 367 F.2d 293 (4th Cir. 1966).

[16] *See, e.g.,* California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994); Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1984).

[17] Stay Order at ¶ 26. The Commission also noted, in footnote 43 to the Order that "the price set by the Florida Commission for GTE-Florida was itself significantly higher than those the commission set for BellSouth and United/Centel -- the other local telephone companies for which the state commission has set unbundled loop prices in Florida."

implementation of the Congressional intent to speed the availability of competitive local telecommunications offerings.[18] As interim guides, the default pricing proxies will only apply until such time as individual States undertake necessary cost studies -- an exercise which is mandated by the 1996 Act and which the Commission has encouraged the States to engage in expeditiously.[19] As described by the Commission:

> While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. . . . Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply.[20]

Certainly, the default pricing proxies adopted by the Commission are consistent with its statutory mandate to "establish regulations to implement the requirements of [Section 251 of the 1996 Act]," including the requirements that interconnection and unbundled network elements be made available at just, reasonable and nondiscriminatory rates and that retail services be offered at wholesale rates.[21] IUB is not, however, bound by the default proxies. The default pricing proxies can be avoided simply by undertaking requisite cost studies (or demonstrating that cost studies already performed are consistent with federal pricing guidelines). IUB is free to undertake the requisite cost studies or to demonstrate that the extensive record upon which

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[18] First Report and Order, FCC 96-325 at ¶ 619.

[19] Id.

[20] Id.

[21] 47 U.S.C. §§ 251(c) (2), (3), (4), (d) (1).

unbundled rates in Iowa have been based constitutes a cost study consistent with the federal pricing guidelines. In either case, IUB's rates would then prevail over the default proxies.

B. The States Have Failed To Demonstrate That Irreparable Harm Will be Suffered Absent A Stay

Both FPSC and IUB found their showing of irreparable harm on the premise that in overstepping its statutory authority, the Commission has deprived the States of a Constitutional right to sovereignty over state policies and that such deprivation itself constitutes per se irreparably injury.[22] As discussed earlier, the 1996 Act reworked pre-existing jurisdictional boundaries, providing for federal regulation of matters historically intrastate in nature and vice versa. The Commission hasthus not overstepped its jurisdictional authority.

The harm the States otherwise attempt to document is either speculative in nature or capable of avoidance. In neither case is a stay justified. The "examples of real world irreparable harm" cited by FPSC are no less amorphous and speculative than the alleged harm cited by GTE, SNET and U S West -- all of which the Commission has held "do not satisfy [the] exacting standards" for documenting irreparable harm.[23] FPSC presents only generalized allegations of potential harm to businesses, consumer confusion, and negative impacts on tourism, all resulting from implementation of the Commission's local competition rules. FPSC's general allusion to potential harm to Florida businesses and residents should the Commission's First

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[22] FPSC Motion at 23; IUB Motion at 7.

[23] Stay Order at ¶ 8.

Report and Order become effective as scheduled does not rise to the level of the "concrete showing of irreparable harm" which is an essential factor to grant of a stay."[24]

The Commission has long held that "[t]o show irreparable harm, 'the injury must be both certain and great; it must be actual and not theoretical.'"[25] Moreover, the Commission has required that "the party seeking relief must show that 'the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'"[26] As the Commission has steadfastly held, "[b]are allegations of what is likely to occur are of no value since the [Commission] must decide whether the harm will in fact occur. The movant must provide . . . proof indicating that the harm is certain to occur in the future."[27] "[U]nsubstantiated and speculative claims," and "generalized assertions" of harm have been found by the Commission to be inadequate to support a claim of irreparable harm and the grant of a stay.[28]

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[24] Id., citing Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Circ. 1985); Wisconsin Gas v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

[25] *See, e.g.,* Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd. 3214 at ¶ 29 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[26] Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶ 19, fn. 53 (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), *quoting* Ashland Oil, Inc. v. FTC, 409 F.Supp 297, 307 (D.D.C.), *aff'd* 548 F.2d 977 ((D.C. Cir. 1976)).

[27] Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991, ¶ 14 (1995) (*citing* Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[28] *See, e.g.,* Cellularvision of New York, L.P. v. Sportschannel Associates, Petition for Stay Pending Reconsideration of Order on Program Access Complaint, 10 FCC Rcd. 13192 at ¶ 5; Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 11991 at ¶¶ 14-16; Price Cap Regulation of Local Exchange Carriers, 10 FCC Rcd. 11979 at ¶¶ 18-19; Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd. 123 at ¶ 8; Cincinnati Bell Telephone Company, 8 FCC Rcd. 6709, ¶ 10 (1993).

IUB complains that implementation of Commission-established default proxies will "upset three years of careful, detailed work toward competition in Iowa and constitute an unauthorized intrusion in the states' authority to oversee the detailed working of telecommunications providers in their respective states."[29] With respect to the latter contention, the Commission has held that "Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1943 Act . . . The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues."[30] With respect to the former contention, as discussed above, IUB possesses a clear alternative to the implementation of default pricing proxies.

To the extent IUB believes the default proxies to be imposed are set at an unrealistically high level and will result in rates for unbundled elements significantly above cost in Iowa, IUB may undertake cost studies to document its position. The Commission has specifically provided proxies for use "by a state commission until it is able either to complete a cost study or to evaluate and adopt the results of a study or studies submitted in the record" and "encourag[ed] states to have economic studies completed wherever feasible."[31] Further, the Commission has confirmed that "the use of the hybrid proxy model can be superseded at any time by a full forward looking economic cost study;"[32] the ability to avoid implementation of the

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[29] IUB Motion at 8.

[30] First Report and Order at ¶ 83.

[31] Id. at ¶¶ 790-91.

[32] Id. at ¶ 798.

default proxies lies entirely with IUB and thus the effectiveness of the defaults generally cannot be characterized as "irreparable harm".

C. The Commission Has Previously Determined that Grant of a Stay Would Substantially Harm Interested Parties

In denying earlier-filed stay requests in this matter, the Commission held that petitions had failed to demonstrate the essential showing that no harm would result to other interested parties should the stay be granted. To the contrary, the Commission found grant of a stay "would have a significant impact on whether potential new competitors currently involved in negotiations and state arbitration proceedings choose to enter local exchange and exchange access markets at this crucial time".[33]

In crafting rules implementing Sections 251 and 252 of the 1996 Act,[34] the Commission was cognizant of the hurdles small carriers, as new entrants into the local telecommunications market, would face in confronting entrenched incumbent local exchange carriers ("ILECs") possessed not only of monopoly market power, but orders of magnitude greater resources. Thus as a general matter the Commission explained that it adopted "national rules" where:

> they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of

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[33] Stay Order at ¶ 16.

[34] 47 U.S.C. §§ 251, 252 (1996).

> litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.[35]

Stating that "it is important that the regulations established in the First Report and Order not be stayed" the Commission reiterated that

> [o]ur national rules serve the critical role of equalizing bargaining power by establishing certain baseline principles that will 'reduce delay and lower transaction costs' -- burden that we have found 'impose particular hardships for smaller entities that are likely to have less of a financial cushion than larger entities.' A stay would undermine that critical role at a most important time, disproportionately harming the competition that the statute contemplates for new entrants."

TRA respectfully submits that grant of a stay would result in precisely the type of harm to smaller entities which the Commission has so carefully sought to avoid and would unduly restrict the benefit to consumers to an actively competitive local telephone market.

D. The Public Interest Would Not Be Served By Grant Of The Requested Stay

The Commission has addressed and rejected the public interest arguments raised by the States. Like the States, GTE and SNET argued that a stay would serve the public interest by precluding uneconomic entry -- i.e., entry by companies that would not normally enter. The Commission found, instead, that "a stay might discourage entry by some who have every reasonable qualification to compete and would do so under our rules. A stay in this crucial initial period would not serve the public interest unless our rules were virtually certain to be set aside on review and the actions taken on interconnection requests in the meantime were irreversible."[36]

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[35] First Report and Order, FCC 96-325 at ¶ 41.

[36] Stay Order at ¶ 19.

The Commission further noted that "the circumstances of this specific case particularly militate against the grant of the[] motions. Ordinarily, when we are asked to stay the effectiveness of one of our orders or rules, the moving party seeks to maintain the *status quo* . . . Petitioners do not seek to preserve the *status quo* but to overturn Congress's requirement that state arbitrators ensure that approved interconnection agreements reflect the Commission's regulations implementing section 251."[37] Similarly, FPSC and IUB seek not to maintain the status quo but rather to overturn Congress' grant of implementing authority to the Commission.

TRA agrees with the Commission that "the primary beneficiary of the competitive policies [the Commission's] rules were designed to implement is the public" and with the Commission's conclusion that "a stay would disserve the public interest profoundly by eliminating our rules from the process of negotiation and arbitration at the very most crucial time."[38]

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[37] Id. at ¶¶ 28-29.

[38] Id. at ¶ 22.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to deny the Motions for Stay Pending Judicial Review filed by the Florida Public Service Commission and the Iowa Utilities Board, respectively, in the captioned docket and to permit the pro-competitive rules adopted in its First Report and Order to become effective as currently scheduled.

Respectfully submitted,

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